ignore the structure and spirit of the Act, the unusual facts and procedural history of this matter, and the practices that have been developed by State commissions around the country in implementing the Act. Specifically, the RPA's analysis improperly assumes that any action taken by the Board to modify the November 8, 1996 written arbitration opinion was outside of the Board's Section 252(b)(4) authority over the arbitration process. See RPA Brief at 20-24. That analysis ignores the District Court's well-reasoned finding that the Board's July 1997 decision to substitute generic rates for the flawed arbitration rates, although coming after the statutory period for resolving arbitrations under Section 252(b)(4)(C), was entirely consistent with the Act's goal to "ensure[] that interconnection issues will be resolved expeditiously" in order to "jumpstart local competition." Opinion at 10 (15a).

It is important to recognize in this connection that the pricing terms recommended by the arbitrator were the outcome of a limited process in which "the arbitrator was confronted with a cost of service record which contained only AT&T's cost study, utilizing the Hatfield Model, Version 2.2.2, and BA-NJ's recommendation to set interim rates based on the default and proxy rates set forth in the FCC's First Report and Order." Local Comp. Order at 233 (135a). Several developments following the issuance of the arbitrator's decision, regarding which the

RPA is notably silent, further undercut the utility of the arbitrator's rate recommendation.

For example, in a joint letter dated January 17, 1997, AT&T and BA-NJ informed the Board that "the process of reducing the arbitrator's decision to a contract consumed considerably more time than previously anticipated." Indeed, at the time the Board announced its Generic Proceeding decision at its July 17, 1997 agenda meeting, "no interconnection agreement had been presented to the Board, nor had either of the parties requested or sought Board assistance in reaching an agreement." Id. at 234-35 (136-37a). In addition, by July 1997 the Board had, through its Generic Proceeding, developed a large body of evidence and expertise regarding rates that would satisfy the Act.[58] The Board could not accept the rates from the AT&T arbitration because the Board found that the sole cost model upon which they were based, i.e., Hatfield 2.2.2., suffered from "numerous deficiencies" and "significant flaws" infecting the model so profoundly that it "reflects a network which may not provide safe adequate and proper service . . . [and] result[s] in rates which would not fairly compensate BA-NJ." Local

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[58] See Local Competition Order at 244 (146a) ("[t]he serious weakness in the AT&T/BA-NJ arbitrator's record did not occur in the generic proceeding, in which the Board had the advantage of having before it studies analyzing BA-NJ's costs submitted (cont'd. on next page...)

Competition Order at 248-49, 253 (150-51a, 155a).[59] Thus, the Board was convinced that "the Hatfield model cannot alone form the basis of just and reasonable rates for interconnection and unbundled network elements." Id. at 253 (155a). Clearly, the arbitrated rates did not satisfy the requirements of the Act.

In light of the foregoing, it is significant that the RPA has ignored the District Court's recognition that under Section 252(b)(4)(B), the Board is authorized to require information from the parties to an arbitration "as may be necessary for the State commission to reach a decision on the unresolved issues." Opinion at 10 (15a). On the facts of this case, the RPA's premise that the Board was restricted by the Act to accept the non-Act compliant arbitrated rates or reject the entire agreement, similar to AT&T's argument before the District Court that "the commission was obligated to adopt the arbitrated agreement because it had a nine month deadline and the Hatfield model rates were the 'best information available' within that

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jointly by AT&T and MCI, BA-NJ and the Advocate, and thoroughly tested and commented on by all the parties").

[59] See also id. at 62-64 (13-15sa) (discussing some of the "inherent flaws" in the Hatfield model, e.g., it is "not based on sound engineering assumptions," it includes an inadequate "level of equipment to develop an operational network," and it relies on "unsubstantiated and undocumented outside plant cost inputs"; concluding that "[t]he combination of these inherent flaws . . . renders its results highly suspect and in some cases without substantiation in the record").

timeframe," is simply not a reasonable interpretation of the statute. See Opinion at 10-11 (15-16a). See also MCI Telecommunications Corp. v. Pacific Bell, et al., 1998 U.S. Dist. Lexis 17556, Order Regarding Parties' Cross Motions for Summary Judgment, at *6, *23-25, *30-32 (N.D. Cal. Sept. 29, 1998) (221sa, 225sa, 227sa) ("[t]o preclude the [commission] from considering relevant information simply because [it] was not presented . . . in connection with a particular arbitration would be both inefficient and would frustrate the [commission] from successfully performing its important work of reviewing and approving interconnection agreements to ensure that these agreements comply with federal and state law"). Indeed, at the time the agreement actually was submitted to the Board the information from the Generic Proceeding was the most comprehensive and best information available (Local Competition Order, pp. 244-45 (146-47a)); the Board could not ignore this information simply because the arbitrator had made his recommendation.

Moreover, the RPA's attempt to distinguish between the scope of the Board's authority "during the arbitration" and during "the review of a consummated arbitrated agreement" (RPA Brief at 26-28) should be rejected in light of the facts of this case, the terms of the Act, and the District Court's well-reasoned approach. As a preliminary matter, the RPA's

assumption that the arbitrator's order gave rise to a "consummated arbitrated agreement" that the Board was then limited to "accept or reject" under Section 252(e) is false. No agreement containing the arbitrated rates had ever been "consummated" at the time of the Board's Generic Proceeding decision and the Board plainly had authority under Section 252(b)(4) to modify the AT&T/BA-NJ agreement requesting the parties to incorporate the generic rates.

For example, in U.S. West Commun., Inc. v. Hix, 57 F. Supp.2d 1112 (D. Colo. July 22, 1999), the plaintiff ILEC argued unsuccessfully that the commission "violated the Telco Act and exceeded the scope of its authority under the Act by imposing requirements that are 'onerous and unlawful.'" Id. at 1119-20.[60] Finding that the commission acted properly under the Act, the court reasoned that "[t]he Telco Act grants broad authority to state commissions to impose reasonable terms and conditions as part of the arbitration and appeal of interconnection agreements." Id. at 1120 (citing, inter alia, section 251(c)(2) as obligating the Board to provide just, reasonable and nondiscriminatory terms and section 252(b)(4) and (c) as authorizing the Board to resolve all "open issues"). As in Hix,

[60] The terms in Hix included requirements that U.S. West consult with AT&T in advance of filing tariffs, and provide advance (cont'd. on next page...)

here the Board's broad authority under the Act to resolve the fundamental issue of just, reasonable, and nondiscriminatory rates, even after interconnection agreements were filed, empowered and, indeed, obligated the Board to incorporate the Generic Proceeding rates into the AT&T/BA-NJ interconnection agreement in lieu of the arbitrated rates, which did not comply with the Act.[61]

Even under the RPA's narrow conception of the Board's authority in this case as limited to "accepting or rejecting" the arbitrator's proposed rates, the Board's actions should be affirmed. The Board's decision that the parties should include the Generic Proceeding rates in their Interconnection Agreement absent an agreement otherwise was, in effect, a rejection of the AT&T arbitration agreement with an indication of the terms that could be included to meet the Board's approval requirement, as required by the Act, for rates, terms and conditions that are just, reasonable and non-discriminatory. An analogous situation

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notice to AT&T and MCI of the availability of new products for market testing. Ibid.

[61] The RPA's challenge to the District Court's alleged reliance on Section 261 (RPA Brief at 24-26) is a red herring. In essence, the RPA argues that this Section does not provide the Board with authority to impose requirements in an arbitrated agreement that are inconsistent with the Act. As discussed herein, the Board's incorporation of the Generic Proceeding rates in the AT&T/BA-NJ agreement was entirely consistent with the Act.

was presented in U.S. West Comm., Inc. v. Garvey, et al., 1999 U.S. Dist. LEXIS 22042 (D. Minn. March 30, 1999). In Garvey, the State commission issued an order approving an interconnection agreement subject to certain modifications that the commission determined were necessary in order for the agreement to meet the reviewing standards of the Act. Id. at *15-16, *95 (165sa, 183sa). The commission further ordered the parties to submit a final agreement incorporating the ordered terms. Id. at *15-16 (165sa). U.S. West argued that the commission exceeded its authority under Section 252(e) by "unilaterally modifying" portions of the parties' interconnection agreement "rather than approving or rejecting the Agreement with 'written findings as to any deficiencies.'" Id. at *95 (183sa). The District Court upheld the commission's approach:

> The practical effect of the [commission's] order was to reject the Agreement as submitted. The [commission] then took the additional step of informing the parties as to the specific deficiencies and how they could be cured. Nothing in the Act restricts the [commission] from informing the parties what language, if adopted, would be approved by the [commission].
>
> [Id. at *95-96 (183sa).]

As in Garvey, this Court should conclude that the practical effect of the Board's action was the rejection of a proposed arbitrated agreement with an indication as to what

modifications, if adopted, would be approved by the Board. Viewed in this light, the Board's action, even under the restrictive and formalistic position urged by the RPA, is consistent with the Act.

Moreover, even assuming that the Board's action was a "modification" rather than a rejection of the proposed agreement, that action was consistent with the Board's authority under Section 252(e). This authority was recognized in GTE North Inc. et al. v. McCarty, 978 F. Supp. 827 (N.D. Ind. 1997), in which the court dismissed a challenge of an arbitrated outcome for lack of subject matter jurisdiction, reasoning that the commission could subsequently change the arbitrated results when reviewing the actual interconnection agreement incorporating those results. Id. at 833-36, 835 n.3. The court expressly recognized that "under the Act, the possibility exists for a state commission to reconsider the substance of a previous arbitration order when reviewing a final agreement that reflects the order," and to correct "parts of a previously issued arbitration order [that] were wrongly decided." Id. at 835. McCarty thus underscores the commission's authority under Section 252(e) to review -- and alter if it deems it appropriate to do so -- arbitrated terms the commission finds to be inconsistent with the Act.

Indeed, several state commissions have modified proposed interconnection agreements. Some commissions have made changes in the course of their approvals of those agreements, approving them subject to specified modifications.[62] Commissions also have decided, like the New Jersey Board in this case, to modify arbitrated interconnection agreements based upon later determinations in generic proceedings, approving them with interim rates to be replaced by subsequent commission-determined rates.[63] These numerous examples of modifications belie the

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[62] See, e.g., AT&T Communications of Cal. v. Pacific Bell, et al., No. C 97-0080, et al., 1998 U.S. Dist. LEXIS 10103, *14 (N.D. Cal. May 11, 1998) (191sa)(commission approved arbitrated interconnection agreement "with minor modifications"), aff'd, 203 F.3d 1183 (9th Cir. 2000); Southwestern Bell Tel. Co. v. AT&T Communications of the Southwest, Inc., 1998 U.S. Dist. LEXIS 15637, *8-9 (W.D. Tex. August 31, 1998) (203sa) (same); U.S. West Communic. v. TCG Seattle, et al., 1998 U.S. Dist. LEXIS 22271, *3, No. C97-354WD (W.D. Wash. Jan. 22, 1998) (216a) (same).

[63] See, e.g., MCI Telecomm. Corp., et al. v. Pacific Bell, et al., No. C 97-0670 SI, et al., 1998 U.S. Dist. LEXIS 17556, at *22-23 (N.D. Cal. Sept. 29, 1998) (225a) (noting that the state commission rendered the parties' interconnection agreement rates interim subject to modification based upon later determinations in generic proceeding to establish permanent rates for UNEs); I/M/O Petitions for Approval of Agreements and Arbitration of Unresolved Issues Arising Under Section 252 of the Telecommunications Act of 1996, Case No. 8731, Order No. 73010 (Md. P.S.C. Nov. 8, 1996) at 3 n. 5, 6-10 (252sa, 255-59sa) (same); I/M/O AT&T Comm. Of Michigan, Inc. for Arbitration to Establish Interconnection Agreement, Case No. U-11165, Order Approving Agreement Adopted by Arbitration, pp. 4, n.2, 6-8 (Mich. P.S.C. Dec. 12, 1996) (295sa, 297-99sa) (same); Petition of MCI Telecomm. Corp., Case 96-C-0787, Opinion No. 96-33, 1996 N.Y. PUC LEXIS 702, at *9 (NY PSC Dec. 23, 1996) (311sa) (same); U.S. West Communic. v. MFS Intelenet, Inc., 193 F.3d 1112, 1117-
(cont'd. on next page...)

RPA's contention in this case that under section 252(e) a commission may only issue a stamp of approval or rejection of an interconnection agreement without taking further action.

Finally, telecommunications carriers across the nation have frequently requested modifications of arbitrated determinations, even after their agreements have been filed, and commissions have frequently granted those requests, supporting the conclusion that a commission may take action to modify an arbitrated agreement even after an agreement is filed.[64] In

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18 (9th Cir. 1999), cert. denied, 147 L. Ed. 2d 1005, 120 S. Ct. 2741 (2000) (same regarding Washington Commission); U.S. West Commun., Inc. v. Hix, 93 F. Supp.2d 1115, 1117 n.3, 1123 (D. Colo. 2000) (indicating that the state commission consolidated arbitration proceedings among ILEC and several CLECs, and established separate dockets for pricing and non-pricing issues); Southwestern Bell Tel. Co. v. AT&T Communications of the Southwest, Inc., 1998 U.S. Dist. LEXIS 15637, *8 (203sa) (W.D. Tex. August 31, 1998) (commission consolidated the arbitration proceedings); AT&T Communications of Virginia et al. v. Bell Atlantic-Virginia, et al., 197 F.3d 663 (4th Cir. 1999) (noting that the Virginia state commission consolidated the arbitration cases among AT&T & MCI & Cox Fibernet Commercial Services, Inc. and BA-VA); GTE South, Inc. et al. v. Morrison, 199 F.3d 733 (4th Cir. 1999) (Virginia state commission consolidated arbitration cases between CLECs and GTE); I/M/O the Consolidated Petitions of AT&T, et al. for Arbitration with U.S. West Communications, Inc. Pursuant to Section 252(b) of the Federal Telecommunications Act of 1996, Docket Nos. P-442, et. al., 1996 Minn. PUC LEXIS 161, *5, 133 (Minn. PUC Dec. 2, 1996) (378-79sa, 432sa) (rendering a decision on the consolidated arbitrations between U.S. West and AT&T, MCI, and MFS and indicating that the prices established therein were interim, subject to true-up based on the results of the commission's generic cost proceeding).

[64] See, e.g., U.S. West Communic. Inc. v. Mecham, et al., 1999 U.S. Dist. LEXIS 22003, *3-4 (D. Utah Aug. 13, 1999) (456sa) (cont'd. on next page...)

other words, contrary to the RPA's position, the issuance of an arbitrator's decision and commencement of the Board's review process under Section 252(e) plainly did not in this case divest the Board of "the ability to impose conditions or establish rates." RPA Brief at 27. For example, in McCarty, supra, 978 F. Supp. at 835, the parties submitted agreements after the arbitration orders were issued "which contained disputed language[, thus] lend[ing] credence to the view that the Act allows further negotiations and decisions subsequent to an arbitration decision." Similarly in New Jersey, BA-NJ and MCI clearly assumed that the Board had authority to modify their interconnection agreement when they submitted an agreement containing disputed language and requested Board resolution.[65]

(noting that after parties filed separate, fully executed interconnection agreements they sought reconsideration of a number of issues; state commission later issued order on reconsideration); AT&T Communic. of Michigan, Inc. v. Michigan Bell Tel. Co. et al., 60 F. Supp. 2d 636, 638-39 (E.D. Mich. 1998) (parties filed several agreements on different dates, each with disputed provisions, after the state commission issued an order approving an arbitrated interconnection agreement and directing the parties to file "a complete copy of the...agreement, as adopted by the arbitration panel and as modified by the [commission]").

[65] Application of BA-NJ and MCI for Approval of an Interconnection Agreement Under Section 252(e) of the Act, NJBPU Docket No. TO960806221, dated July 1, 1997 (161sa-D).

B. Because Neither The Board Nor The District Court Mandated Uniform Statewide Rates For All Arbitrated Agreements, The RPA's Statutory Construction Argument Based On That Assumption Must Fail

Point I.D. of the RPA's brief, alleging that the District Court has "violate[d] several canons of statutory construction," rests entirely on the misconception that the District Court's holding allowed the Board to mandate that all arbitrated agreements include uniform rates.[66] Because the RPA misconstrues both the Board's ruling and the scope of the District Court's holding, its argument based on "canons of statutory construction" must fail.

First, the Board did not mandate that the rates from the Generic Proceeding replace all arbitrated rates. Rather, it provided in the limited instance of the BA-NJ/AT&T arbitration that the parties use the Generic Proceeding rates rather than the arbitrated rates. Local Competition Order at 254 (156a).[67]

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[66] See RPA Brief at 29 ("[s]ince all rates will be the same, there will be nothing to 'pick and choose'"); id. at 30 ("[e]liminating price completely from any consideration in negotiation and arbitration through the establishment of uniform rates undermines the necessary assumption that Congress wanted negotiation and arbitration to foster competition"); id. at 31 ("the Board's decision . . . would leave only one price option" and the District Court's interpretation would give the Board authority to substitute generic rates for arbitrated rates "in every case").

[67] The Board set rates for other interconnection agreements that had been executed prior to the Board's decision because all those agreements, whether arbitrated or negotiated, had established "interim" rates, to be replaced by the rates

(cont'd. on next page...)

The Board did so only after finding that the alternative sought by AT&T was inconsistent with the requirements of the Act,[68] and only insofar as the parties could not negotiate otherwise.[69] Moreover, the Board expressed its willingness to consider rates other than those approved in the Generic Proceeding "should events dictate," and "encourag[ed] the parties to work together" to develop an alternative methodology "that the Board could review and adopt on a going forward basis." Local Competition Order at 70-71 (16-17sa). As with respect to all other issues, the RPA's contention that the Board's action has rendered inoperative the negotiation and arbitration provisions of the Act is utterly divorced from the Board's actual decision.

Similarly, the District Court's decision is limited to the Board's ruling and thus is not as broad as the RPA suggests to this Court. The District Court's review was restricted to the Board's use of the Generic Proceeding rates instead of the AT&T arbitrated rates in the AT&T/BA-NJ Interconnection Agreement under the circumstance that prevailed in this case. See Opinion

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determined in the Generic Proceeding. See Local Comp. Order at 230-33, 246 (132-35a, 148a).

[68] See 13-15sa (setting forth some of the Board's criticisms of the Hatfield model, which alone provided the basis for the AT&T arbitrator's recommendation).

[69] Local Competition Order at 254 (156a) (limiting its rejection of the AT&T Agreement to the "rates, terms and conditions [that] (cont'd. on next page...)

at 11 (16a) ("the Court will affirm the Board's decision not to adopt the AT&T-Bell agreement containing the arbitrated rates"). Indeed, the court circumscribed its holding accordingly in the June 6, 2000 Order accompanying its Opinion: "[T]he Board's decision to substitute generic rates for the arbitrated rates in the AT&T-Bell Atlantic interconnection agreement is affirmed" (emphasis added)(5a).

Thus, contrary to the RPA's contentions, the District Court has affirmed the Board's decision to substitute rates only in the instant situation, where it is beyond dispute that the "arbitrated" rates could not withstand scrutiny under the Act and where the Board did not preclude the parties from negotiating other rates.

C. Because Neither The Board Nor The District Court Mandated Uniform Statewide Rates For All Arbitrated Agreements, The RPA's "Congressional Intent" Argument Is Based On A False Assumption And Must Fail

The RPA's argument based on Congress's intent to promote diversity and competition (RPA Brief at 31-36), like its "statutory construction" argument, rests on the RPA's mischaracterization of the Board's decision. As discussed in Point II.B., supra, the RPA contends that the Board has negated the practical value of negotiation by "requiring that all

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have not been successfully negotiated by AT&T and BA-NJ"; see also 122, 129-30sa.

agreements have the same rate." RPA Brief at 35. Because the RPA's argument continues to mischaracterize the Board's and the District Court's action, its conclusion that those actions constitute a violation of Congressional intent is baseless and should be rejected.

First, as demonstrated above, the Board did not demand the use of identical rates in all interconnection agreements, and the District Court's holding is limited to the affirmance of the Board's decision to use the Generic Proceeding rates in the AT&T/BA-NJ Interconnection Agreement, where no other Act-compliant rates were available. The RPA's suggestion that the Board has precluded all carriers from negotiating different rates is plainly without basis in the record. Indeed, even in the case of the AT&T/BA-NJ Interconnection Agreement, the Board permitted the parties to negotiate rates different from those determined in the Generic Proceeding. See 156a; 122, 129-30sa.

Second, the RPA incorrectly claims that the Board rejected the AT&T arbitrated rates out of its desire to impose uniform statewide rates. See RPA Brief at 31-32. While the Board acknowledged a benefit to having consistent (not necessarily "uniform") statewide rates,[70] it rejected the AT&T/BA-NJ

[70] "Consistent" rates do not necessarily mean "uniform" rates. For example, simply because all CLECs pay the same rate for the (cont'd. on next page...)

arbitrated rates because it found that those rates were not Act-compliant. The District Court correctly affirmed this basis for the Board's decision. Opinion at 10 (15a). The RPA's attempt to elevate the Board's consideration of consistency to the underlying reason for its decision to reject the arbitrated rates is a misreading of the Board's decision and the District Court's holding based thereon.

Third, although the Board's order did not mandate uniform statewide rates, the Act itself underscores the possibility of uniform statewide rates. In addition to mandating nondiscriminatory rates,[71] the Act provides authority for a State commission to render a single rate determination for all telecommunication carriers within that state for interconnection agreements that are the subject of a consolidated arbitration. 47 U.S.C. § 252(g). Indeed, Congress may not even have envisioned different arbitrated rates within the same state. Congress provided that the "State commission" was to conduct all arbitrations within its state. 47 U.S.C. § 252(b). If the same arbitrator (the commission) conducted all the arbitrations within the state, and rates are to be nondiscriminatory and based on cost (which, presumably, does not vary according to the

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same service does not mean that all their customers will pay the same rate.

[71] See 47 U.S.C. §§ 251(c)(2)(D), 252(d)(1)(A)(ii).

requesting carrier), it is eminently reasonable for all CLECs' rates to be consistent.[72]

As noted above, with the sole aberration of the arbitrator in the AT&T proceeding (who was one of the first arbitrators to render a recommendation in New Jersey and whose approach was not followed by any other arbitrator in the State), every interconnection agreement in New Jersey (whether reached by arbitration and/or negotiation) established interim rates to be replaced by the Generic Proceeding rates. In its August 7, 1997 Prehearing Order (p.3, 38sa), the Board expressly announced that "the information developed in (the Generic Proceeding) may well be relevant in assisting the Board to avoid disparate or inconsistent decisions" in its arbitration. Indeed, the Board ultimately faced the precise result which it had hoped to avoid by its conduct of the Generic Proceeding, i.e., two arbitrators' recommendations in which "the rates for BA-NJ's two largest competitors [AT&T and MCI] were substantially and materially inconsistent despite being the results of proceedings in which the information available to the decision-maker was the same." Local Competition Order, pp. 245-46 (147-48a). See also id. at 242, 249 (144a, 151a). The RPA's argument that rate consistency

[72] Negotiations and/or arbitrations would still be necessary to resolve technical issues and rate issues where a CLEC has (cont'd. on next page...)

is contrary to the Act's legislative intent ignores this procedural history and is otherwise baseless.[73]

Fourth, although the Board did not do so, numerous other State commissions have adopted uniform rates by way of generic cost proceedings or consolidation of the cost/rate portions of the proceedings.[74]

Finally, the RPA excises language from the Board's discussion of Section 252(i) in support of a contention that the Board found "that uniform rates were 'necessary' for competition." RPA Brief at 34. Nowhere has the Board made such a finding. The Board in fact mentioned that Section 252(i) alone may be insufficient to lead to the "consistency" necessary for fair competition. The Board's concern is wholly in accord with the Act, which envisions a certain amount of consistency

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different requirements, network structure, or other characteristics.

[73] See also U.S. West Commun., Inc. v. AT&T Commun. of the Pacific Northwest, Inc., 31 F. Supp. 2d 839, 845-46 (D. Or. 1998) (characterizing as "troubling" a situation where different arbitrators set different interim wholesale discounts; "[s]ince the wholesale discount rate ostensibly reflects US West's cost savings, in theory the rate should be the same regardless of which CLEC is purchasing the services . . . . [A]s the PUC gains experience in analyzing cost avoidance data, it will be hard to justify setting different discount rates for each CLEC"), modified and remanded on other grounds, 46 F. Supp. 2d 1068 (D. Or. 1999).

[74] See supra note 63.

being achieved by State commissions' imposing nondiscriminatory requirements, and not by Section 252(i) "alone".[75]

POINT III

PREEMPTION

As shown above, neither the Board's decision nor the District Court's holding precludes negotiation or arbitration. Nevertheless, the RPA asserts that the Board has established a "policy of generic rate substitution," and, from this unfounded assertion, concludes that the Board has violated the FCC's preemption orders by precluding negotiation and arbitration. See RPA Brief at 39-41.

Neither the Board nor the District Court set any minimum/maximum, one-rate requirement. Rather, in the Generic Proceeding, the Board established rates generally available to carriers seeking to compete with BA-NJ but not desiring to negotiate or arbitrate. Local Competition Order, pp. 10-11 (10-11sa). The Board found that in the limited case of AT&T, the Generic Proceeding rates should be employed rather than the non-Act-compliant arbitrated rates -- unless the parties could negotiate otherwise. Indeed, that AT&T and Verizon are now in the process of determining rates for their new interconnection

[75] The RPA itself concedes that both the nondiscrimination requirements and section 252(i) provide for a certain amount of (cont'd. on next page...)

agreement demonstrates the lack of merit in the RPA's argument that anyone is precluded by the Board's decision from seeking more favorable provisions.

The RPA's reference to the FCC's Arkansas Preemption Order[76] is inapposite. That case involved a state statute setting forth standards for reviewing negotiated agreements and Statements of Generally Available Terms and Conditions that differed from the Act's standards. 14 FCC Rcd 21579, 21613-14. Nowhere has the Board or the District Court changed the standard of review for rejecting interconnection agreements. Contrary to the RPA's contention, the Board did not reject the AT&T arbitrated rates because they were not equal to the Generic Proceeding rates. Those rates were rejected because they were not consistent with the Act's requirements that rates be cost-based. See, e.g., Local Competition Order, pp. 248-49, 253 (150-51a, 155a).[77]

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consistency to develop among interconnection agreements. RPA Brief at 33.

[76] I/M/O American Communications Services, Inc.; MCI Telecom. Corp.; Petitions for Expedited Declaratory Ruling Preempting Arkansas Telecommunications Regulatory Reform Act of 1997 Pursuant to Sections 251, 252, and 253 of the Communications Act of 1934, as amended, Memorandum Opinion and Order , CC Docket No. 97-100, 14 FCC Rcd 21579, FCC 99-386 (rel. Dec. 23, 1999).

[77] Note also that the FCC has provided that where the commission "has already construed a challenged provision of the [state statute] in a manner that vitiates any grounds for preemption, we will decline to exercise our authority to preempt." 14 FCC Rcd 21579, 21585. In the present case the Board's encouragement of the parties to negotiate rates different from the Generic (cont'd. on next page...)

The FCC's Texas Preemption Order discussed by the RPA is similarly inapposite.[78] Contrary to the RPA's claim, the FCC did not preempt enforcement of certain resale restrictions in the ILEC's centrex tariff "because of its effect on negotiation and arbitration." See RPA Brief at 38. Rather, relying on the factual finding that competitors are unable to operate in Texas as they do elsewhere because of the challenged restrictions, the FCC concluded that "enforcement of the [challenged] restriction in [the ILEC's] centrex tariff 'has the effect' of prohibiting the ability of any entity to provide a telecommunications service, i.e., centrex service, through resale in violation of the provisions of section 253(a) of the Act standing alone." 13 FCC Rcd 3460, 3561. In response to the argument that carriers could avoid the tariff restriction through section 252 negotiation and arbitration procedures, the FCC commented that the commission already had upheld this tariff restriction in its section 252 consolidation arbitration award, effectively precluding carriers from invoking those procedures to obtain

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Proceeding rates obviates any notion that the Board considers its decision to have imposed use of the Generic Proceeding rates as an additional requirement for approval of interconnection rates. See Local Comp. Order, pp. 70-71, 254 (16-17sa, 156a).

[78]I/M/O the Public Utility Commission of Texas, et al.; Petitions for Declaratory Ruling and/or preemption of Certain Provisions of the Texas Public Utility Regulatory Act of 1995, Memorandum Opinion and Order, CCBPol 96-13, et al., 13 FCC Rcd 3460, 1997 FCC LEXIS 5390, FCC 97-346 (rel. Oct. 1, 1997).

more favorable terms. Id. at 3559-60. Here, by contrast, the Board has encouraged the parties to negotiate rates different from the Generic Proceeding rates and has not required the Generic Proceeding rates be used in any other agreement.

CONCLUSION

For the reasons set forth above, the decision of the District Court should be affirmed.

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FREDERIC K. BECKER (FB 2583)

Dated: December 22, 2000

Docket No. 00-2000

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

AT&T Communications of New Jersey, Inc.,
Plaintiff in District Court

State of New Jersey Division of the Ratepayer Advocate,
Plaintiff-Intervenor in District Court
and Appellant

v.

Verizon New Jersey Inc.;
The New Jersey Board of Public Utilities, an agency; and
Herbert H. Tate and Carmen J. Armenti, in their capacities as
Commissioners of the Board of Public Utilities,
Defendants in District Court
and Appellees

On Appeal from an Order of the
United States District Court, District of New Jersey

CERTIFICATION OF
BAR MEMBERSHIP (3rd Cir. LAR 46.1)

FREDERIC K. BECKER, of full age sworn upon his oath, certifies and says:

1. I am an attorney admitted to the practice of law to the Bars of the States of New Jersey and New York.

2. I am also, as of 1980, a member in good standing of the Bar of the Third Circuit Court of Appeals as required by 3rd Circuit Local Rule 46.1.

3. I certify that the foregoing statements made by me are true. I understand that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

FREDERIC K. BECKER, ESQ.
WILENTZ, GOLDMAN & SPITZER, P.A.

DATED: December 22, 2000

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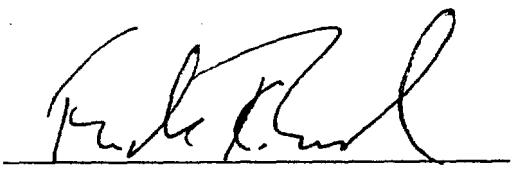
CERTIFICATE OF COMPLIANCE

Pursuant to the Rule of Appellate Procedure, Rule 32(a)(7)(C), the undersigned certifies that this brief contains 12,535 words. This certificate was prepared in reliance on the word count program of the word processing system used to prepare this brief.



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DATED: December 22, 2000